Filed 11/22/16 In re J.H. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.H. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. T.S., Defendant and Appellant.	G053648 (Super. Ct. Nos. 15DP0046 & 15DP0047) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Gary G. Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Leon J. Page, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minors.

After nine-month-old M.B. died by asphyxiation, the juvenile court assumed jurisdiction over now 10-and-a-half-year-old J.H. and three-year-old L.B. (children) under Welfare and Institutions Code section 300, subdivision (b) (failure to protect) and subdivision (f) (death of a sibling through abuse or neglect).[1] In the disposition the court ruled the children were dependents and ordered custody to remain with defendant T.S. (mother) and her husband (father).[2] The court also ordered mother to notify plaintiff Orange County Social Services Agency (SSA) every day of the children's whereabouts and who would be caring for them.

Mother appeals from the finding of jurisdiction under section 300, subdivision (f), claiming there is insufficient evidence that any negligence on her part caused M.B.'s death. She further argues there is insufficient evidence to show the order that she call SSA daily will eliminate the condition that caused the court to take jurisdiction. We are not convinced by either of these contentions and affirm.

FACTS AND PROCEDURAL HISTORY

After M.B.'s death in December 2015 SSA took the children into custody but shortly thereafter returned them to father, on condition mother not have unauthorized contact with them. Mother was granted two-hour supervised visitation, twice a week.

SSA filed a dependency petition pursuant to section 300, subdivisions (b) and (f) based on the death of M.B. There were two separate allegations under subdivision (f): 1) Mother left M.B. and children alone in the home from about 7:20-7:30 a.m. until between 8:39 and 8:57 a.m. Sometime after she got home she found M.B. in a standing position wedged between the mattress and the footboard of the bed, with only the top of his head and nose exposed. He was not breathing and unresponsive. M.B. was

[1] All further statutory references are to the Welfare and Institutions Code.

[2] Father is L.B.'s biological father. Though not the biological father of J.H., he has treated J.H. as a son; the court found he is J.H.'s presumed father. Father is not a party to the action.

taken to the hospital where he was pronounced dead. 2) J.H. explained he awoke at 7:15 a.m. Mother called out to him she was leaving. Mother reported that when she left, M.B. was sleeping in a crib chair on the bed. M.B. could get out of that chair. J.H. did not see M.B. at any time until mother came home. J.H. said mother has left him to supervise M.B. and L.B. many times when she left for awhile.

The subdivision (b) allegations were identical. They additionally pleaded father had been deployed overseas for almost one year and had returned after M.B.'s death. Mother had no information about J.H.'s father, who had not supported J.H., and whom she had not seen for seven years.

In her report, social worker Margaret Vanek (Vanek) stated mother had left the children and M.B. alone in the home while she went shopping for approximately an hour and a half. Vanek believed M.B. would not have died if mother had not left the children alone.

J.H. had not been separated from mother before M.B.'s death and missed her. He was bonded to mother and wanted her to return home. Therefore, Vanek believed it would be detrimental to the children to bypass reunification services, even though they were not required under section 361.5, subdivision (b)(4) because of M.B.'s death.

Reports from SSA and the detective investigating M.B.'s death stated mother explained she needed formula and other things for the children and decided to go to Walmart. She left the house about 7:30 a.m., M.B. was asleep in the chair inside the portable crib in her bedroom. L.B. was asleep in her bedroom. She believed she would be home before they awoke.

According to then nine-year-old J.H., before she left, mother told him he would be in charge of M.B. and L.B. He was still in his bedroom and L.B. was asleep. Mother left him a note saying she was going to the store and to give M.B. a bottle if he

woke up. J.H. explained he did not see M.B. but thought he was still sleeping on mother's bed.

Mother went to Walmart and then Target to buy the needed items. She also bought Christmas decorations, a gift, and a sweater for herself and returned something. After leaving Walmart, she called J.H. to tell him she was going to Target and then would be back. J.H. told her L.B. wanted to get up and have chips; everything was fine. J.H. similarly reported he told mother L.B. wanted to get up and eat crackers. Mother approved that. After L.B. got up, J.H. turned on the television and L.B. ate crackers in mother's bedroom while she watched television. Later, when J.H. returned to mother's bedroom, L.B. was sitting propped up against the pillows and eating chips.

Mother reported that when she was on her way home, she spoke to J.H. on the phone and he explained what L.B. was doing. She told him to have L.B. get off the bed and out of the room so she would not wake up M.B. Cell phone records showed the call was made at 8:39 a.m. Police believed mother got home in approximately 10 minutes or so thereafter.

J.H. explained he did not remember seeing M.B. in his crib chair or the car seat or anywhere else until mother found him. He thought M.B. was sleeping on mother's bed because when he saw L.B. eating chips he saw a blanket piled up on the bed. Later it was not in the same position. He was not thinking about M.B.

When mother arrived home, she did not check on M.B. but fixed cereal for herself and children. Before she ate she showed children the Christmas decorations she had purchased. She also put away a Christmas gift she had purchased for father.

She then saw M.B. was not on the bed but in a standing position wedged between the mattress and the footboard of the bed. His mouth was covered by bedding and the mattress; only the top of his head and his nose were exposed. Mother pulled him out, seeing his mouth wide open and dried tears in his eyes. She yelled to J.H. to call 911. The operator provided CPR instructions to mother, which she tried to perform.

Police were sent to the home at 8:57 a.m. and the officer concluded M.B. did not have a pulse and was not breathing, and performed cardiopulmonary resuscitation (CPR). Paramedics arrived and continued CPR. Paramedics stated M.B.'s body was still warm and concluded he had just died.

Mother explained M.B. knew how to get out of his crib on his own and could move his body around. She believed he probably fell between the mattress and the footboard while he was moving. J.H. stated L.B. had been dropping chips on the floor. J.H. thought M.B. might have picked one up and put it in his mouth.

The autopsy report stated the death was accidental and showed the cause of death as "Positional asphyxia with suffocation" as a result of being "wedged between mattress and footboard." According to the report, based on where M.B. was found, he could have "easily slipped into that position . . . and suffocated within minutes." A child as young as M.B. would not have been able to climb out once he was wedged in. M.B. did not show any sign of trauma and was well-nourished and healthy.

J.H. told Vanek his mother had often left him to take care of M.B. and L.B. if she was not going to be gone for a long time. Otherwise she took them to his maternal grandmother's or another relative's home. Regarding mother's supervision of him, J.H. explained she was "always there with him" and did not leave them alone. Until mother married father it had been just the two of them. He said mother took care of him and was nice. He loved her very much. He missed his mother and wanted her to return to the home.

When the detective spoke to mother she stated, "If I never would have left[,] it never would have happened." "It wouldn't have happened if I was here."

Father told Vanek he had no knowledge mother had ever left children and M.B. home alone except to retrieve the mail or take out the trash. He reported J.H. was upset mother was not home and thought it would be best if she could return.

In 2011, when mother was living in transitional housing, she was reported for leaving J.H. alone while she threw out the trash. She was observed by staff and told them she would be back, stating, "I do this all the time." She was gone for about five minutes. Child protective services was notified and documented the information, explaining it would follow up if this happened again. The housing agency reported it had parenting education programs it would encourage mother to attend.

Police verified the timeline, in part by reviewing videotape from Walmart and Target and noting when the 911 call was made. The detective investigating the case believed mother had left M.B. on the bed and not in the crib chair. This was based on the position of a pillow, blanket, and, car seat in the crib and the way bedding was folded. Additionally, mother stated that when she put away the gift in the closet she had to walk around the bed to look for M.B. in the bassinet. But if he had been there, she would have been able to see from the closet. The barrier made by the pillow blocked the view of the bed from the closet.

It was the detective's opinion "there was a lot of not paying attention and of neglect" by mother. When the detective first arrived the home was "in shambles." There were dishes, rotten food, and flies in the sink, dirty diapers in bags on the patio, and piles of underwear in the bathroom. There were clothes everywhere, including on door handles, in piles in the closet, and on the floor. Piles of old bottles, toys, and a dirty diaper were in the crib. Mother seemed to be "overwhelmed." Two days later when the detective was there, the house was clean.

According to SSA, mother was adhering to the visitation schedule and father stated the visits were going well. Mother reportedly was attending parenting classes. Both parents and J.H. regularly went to therapy. The therapist reported mother was extremely remorseful about leaving M.B. and children alone. Mother was adamant she would never do it again. They never spoke of mother's history of leaving J.H. and L.B. alone before M.B. was born.

SSA recommended the petition be sustained and provided father with maintenance services and mother with an enhancement plan as to L.B. It also recommended reunification services for mother as to J.H.

Testimony at the hearing mirrored the SSA reports. Vanek stated M.B.'s death was caused by mother leaving the children alone. Mother did not check on M.B. for 10 to 15 minutes after she returned home. Vanek agreed that merely not checking on M.B. while feeding children was not a breach of ordinary care. In addition, she testified the evidence was not conclusive as to whether M.B. suffocated while mother was gone or tending to children.

Vanek stated her concern children might still be at risk because mother had not completely dealt with the issue of supervising them. Although, according to the police report, she took blame for M.B.'s death, she had not acknowledged the danger in leaving a nine and a two year old alone. Moreover, mother was stating M.B.'s death was an accident and was blaming SSA for destroying her family. Vanek believed mother should participate in more therapy regarding children's safety before being allowed to return to the home.

The therapist testified sessions with mother covered children's supervision and safety, including not leaving them on their own. It had been effective and mother had made progress. Mother was very sorry for leaving children alone and said she would never do so again. She knew the risks and had learned it was not appropriate to leave a nine year old to babysit. However more work was needed to reinforce that children could not be left alone. Further mother needed to deal with her grief. The therapist also stated mother was overwhelmed and stressed but had not blamed SSA.

The therapist testified that although mother had accepted responsibility for leaving M.B. and children by themselves, she had not taken responsibility for M.B.'s death. Mother claimed M.B.'s death was accidental and she did not know when he had become wedged in the bed, while she was gone or once she had returned. Mother did not

tell the therapist if she had checked on M.B. he would not have died, that his death was her fault because she was not there, or that if she had been home she could have helped him. Had she told this to police, it would be evidence of taking responsibility.

The therapist stated mother was very attached to children, and J.H. missed her. It was safe for mother to return home if father was there. Parents had a plan to make sure children would never again be left by themselves. Mother said an adult would always be with children.

A family friend, Marcus Joseph, had worked with mother when she was a parent partner and had witnessed her with children a few times for a few hours. The parent partner program had included child safety training. He thought mother protected children and since M.B.'s death was "almost hyper-vigilant." She was very sorry about leaving children to go shopping.

At the conclusion of the hearing the court sustained the petition under both subdivisions. Parents were to retain custody with SSA supervision and continue services. Mother was allowed to be at home. Parents were to "at all times notify [SSA] of the whereabouts of the children and who is in charge of caring for them." Mother was ordered to call SSA every day by 7:00 a.m. at the latest to explain children's "itinerary" for that day and who would be caring for them. If the schedule changed, mother was to immediately notify SSA of the change. SSA was ordered to make unscheduled visits to ensure parents were complying. If mother failed to do this, it would be unsafe and the court would remove her from the home. SSA was also ordered to approve all caregivers.

DISCUSSION

1. Review of Section 300, Subdivision (f) Basis for Jurisdiction

Mother did not appeal the section 300, subdivision (b) [death of another child] grounds for jurisdiction, which is essentially identical to the subdivision (f) allegations. The general rule is that if one ground is sufficient to sustain jurisdiction, we need not consider if substantial evidence supports another basis. (*In re Alexis E*. (2009)

171 Cal.App.4th 438, 451.) There are exceptions to this rule, however, such as where another jurisdictional finding used by the court as the basis for challenged dispositional orders (*id.* at p. 454) might prejudice a parent affect a future proceeding (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1015), or could possibly have another consequence (*In re Drake M*. (2012) 211 Cal.App.4th 754, 762-763).

Although we have discretion not to, especially in light of SSA's somewhat perfunctory objection, we will consider the argument.

2. Sufficiency of Evidence to Support Section 300, Subdivision (f) Basis for Jurisdiction

Under section 300, subdivision (f), jurisdiction is appropriate if the parent "cause[s] the death of another child through abuse or neglect." The test for causation is whether acts or omission "were a substantial factor in brining it about. [Citations.] If the actor's wrongful conduct operated concurrently with other contemporaneous forces to produce the harm, it is a substantial factor, and thus a legal cause, if the injury, or its full extent, would not have occurred but for that conduct. Conversely, if the injury would have occurred even if the actor had not acted wrongfully, his or her conduct generally cannot be deemed a substantial factor in the harm. [Citations.]" (*In re Mia Z.* (2016) 246 Cal.App.4th 883, 891 (*Mia Z.*) quoting *In re Ethan C.* (2012) 54 Cal.4th 610, 640 (*Ethan C.*).)

We use a substantial evidence standard to review the court's ruling, "resolv[ing] all conflicts in the evidence, and indulg[ing] all reasonable inferences that may be derived from the evidence, in favor of the court's findings." (*Mia Z.*, *supra*, 246 Cal.App.4th at p. 891.)

Mia Z. and *Ethan C.* are the two primary cases that interpret causation under section 300, subdivision (f). In *Mia Z.* the child walked away from the family residence 120 feet to a busy alley fronting a commercial parking lot. She was killed when a rolling gate made of heavy metal fell on her. The mother, conceding she had failed to supervise the child at the time of her death, argued that failure had not caused

the child's death under section 300, subdivision (f) because the lack of supervision was not a "'substantial factor'" in causing the death. (*Id*. at p. 891.)

The court was not persuaded and instead ruled, "In actuality, Mother's neglect was that she allowed her three-year-old child to walk away unattended from the family home, thus exposing her to dangers of all kinds. That is, she did not keep an eye on her child at the family home in the first instance. [¶] . . . [¶] . . . Mother's neglect . . . was a substantial factor, along with [the child's] own locomotion, and along with the children who pushed down the gate, in causing her death. Mother's argument . . . focuses too much on the end event causing [the child's] death, and ignores that there may be multiple concurrent causes of an end event. [Citation.] Mother's causation argument fails because it overly focuses on the specific instrumentality of [the child's] death, the falling gate, and ignores that [m]other's conduct put [the child] on the path to be in the place where that instrumentality was ultimately applied. In answering the question of what elements contributed to cause [the child] death, it is appropriate to look at the entire chain of events leading to her death, not merely the final event directly causing her death. . . . The evidence in the record supports a finding of factual, 'but for,' causation between [M]other's negligent supervision and her daughter's death." (*Mia Z.*, *supra*, 246 Cal.App.4th at pp. 891-892.)

Much the same can be said here. Mother's neglect was leaving M.B. and children home while she went out for an hour and a half leaving a nine year old in charge.[3]

Mother points out that the doctor performing the autopsy said M.B. could have easily fallen between the footboard and mattress and suffocated within a matter of

[3] A nine year old did not have the capacity to care for an infant and a two year old. Nor should J.H. have been put in that position in the first place. Understandably, he did not think to check on M.B. while mother was gone nor did he pick up chips L.B. dropped near M.B.'s location. He should not have been expected to. J.H. did a more than creditable job and he was not at fault in any way.

minutes. Based on this and the fact M.B.'s body was still warm when paramedics arrived, mother argues M.B. could have suffocated after she returned home and was taking care of J.H. and L.B. Or it could have happened anytime she was home and out of the room. She contends it is not unreasonable to leave a baby alone while he is sleeping. She concludes the accident could have occurred without any negligence on her part.

This is pure speculation and not persuasive. The court found by clear and convincing evidence, even beyond a reasonable doubt, that leaving M.B. and children for such a lengthy period was a substantial factor in causing M.B.'s death.

And there is sufficient evidence to support a finding M.B. died while mother was gone. When mother found him, he had already stopped breathing and CPR was not effective.

Further, it is not unreasonable to conclude that had mother been home, she would have noticed if M.B. was suffocating. We find it compelling that even once she returned home, mother did not check on M.B. for at least 10 more minutes after she had been away for 90 minutes while leaving J.H. in charge. Instead, in addition to feeding children, she showed them a Christmas present she had purchased and put away Christmas decorations.

Mother herself acknowledged that M.B. would not have died if she had not left him and children alone. She stated there were alternatives such as "tak[ing M.B.] with" her. As the court stated, she knew this at the time and she knew it prior to that time. The court also relied on the fact that in 2011 after being observed leaving J.H. alone, she had been taught you cannot leave children alone.

Moreover, the court did not believe M.B. "was left in an appropriate crib." Rather, the evidence showed "it's much more likely that [M.B.] was left on the bed and *that was also neglectful*." (Italics added.)

The investigating detective came to the same conclusion, observing a pillow, blanket, and car seat on the bed being used as a barrier as if to prevent M.B. from rolling off. In addition, mother stated that she could not see M.B in his bassinet from the

closet where she had put away the gift. But the bassinet was visible from the closet; it was the bed that was not visible, due to the barrier.

Mother's attempt to distinguish *Mia Z.* is very similar to that made and rejected by the court in that case. As in *Mia Z.* mother focuses too much on M.B. slipping in the bed and suffocating and does not acknowledge the other concurrent causes. She ignores her regular routine of leaving children and M.B. unattended, in this instance leaving them for more than 90 minutes, that put M.B. in that place. As *Mia Z.* held, "it is appropriate to look at the entire chain of events leading to her death, not merely the final event directly causing her death." (*Mia Z.*, *supra*, 246 Cal.App.4th at p. 892.) It would have been questionable for mother to run to the store to pick up formula and milk. But for her to also do Christmas shopping and buy something for herself while she was gone for 90 minutes was unquestionably negligent.

As the court stated, under these circumstances, M.B.'s death was not "unimaginable," but "predictable." "[T]his is the reason why parents from time in memorial [*sic*] have had people to care for their children when they're not there. . . . That's why we have that support system that mother has described to her therapist that she has available, that she had available at the time. [¶] We have that because we know that with tiny children, very bad things can happen very quickly and it could be a total accident."

In the second principal case, *Ethan C.*, the father did not put the sibling in a car seat and she died when another driver caused an automobile accident. The court found the father's negligence in failing to use the car seat had caused the child's death. (*Ethan C.*, *supra*, 54 Cal.4th at pp. 662-663.) The Supreme Court rejected an argument that the accident was unforeseeable and an intervening cause, thus negating any causation. The very purpose of the seatbelt statute was to avoid such a situation.

Mother argues *Ethan C.* is distinguishable because M.B.'s death could have occurred without her negligence. As discussed above, leaving M.B. unattended for 90 minutes was negligent. That he could have died without her negligence is irrelevant.

In sum, we agree mother harbored no intent to harm M.B. But there was more than sufficient evidence of causation for the court to assume jurisdiction under section 300, subdivision (f).

3. Call-In Order

Section 362, subdivision (a) enables the court to make "all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child." Any orders must "be designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300." (*Id.*, subd. (d).)

Mother challenges the order that she call SSA every morning to advise of children's itinerary. She claims there is insufficient evidence to show the order will alleviate "an accident" that could have occurred very quickly while parents were in another room. Mother maintains the court could have imposed a less intrusive method to protect children, such as ordering she provide a "more general plan" of care giving and requiring notice if it changed. It seems she most especially objects to the requirement she call before 7:00 a.m., complaining she might want to sleep in with children on weekends.

Mother points out she and father are participating in their therapy and otherwise obeying the court's orders. She noted the therapist's testimony she had accepted responsibility for leaving children and M.B. by themselves and her statement she would never do so again. The therapist also believed mother could be left alone with children and it was safe for her to return home.

Mother's arguments do not persuade. First mother selectively cites to the therapist's testimony but does not mention the testimony of Vanek that mother had not accepted responsibility, that she was still calling the death an accident, and had not

admitted it was dangerous to leave a nine and a two year old, and a nine month old home alone.

And the court found "there are indications that despite the things that mom said on the day of the event, that in her mind, things are being altered." The court noted testimony from the therapist that mother was not accepting "responsibility that her conduct led to the child's death, despite the fact that she acknowledged that on the day of the event." The judge also pointed out that when he stated his belief mother was responsible for the death, mother's expression and demeanor showed she thought he was "off base."

The court was looking for a way to allow mother to return home while at the same time ensuring the children would be safe. The order was a reasonable way to accomplish that goal of making sure children would be supervised and not left alone. The order was specifically designed to accomplish that. The fact there might be alternative plans does not make the order here improper.

In fact, the consequences and the plan imposed by the court could have been much more dire. SSA argued "mother should not be complaining about the . . . creative extra efforts to somehow get her back home." Mother objects to this, claiming it was "tantamount" to a "threat[]" to stop her from exercising her appellate rights, causing a "chilling effect." We do not see it that way. Rather, we read it in the context that the consequences could have been much worse and there is little basis for mother to complain about this particular order.

Further, even with the order in place, that an accident could occur within minutes while she or father was not in the room does not mean the plan is not supported by sufficient evidence. As SSA points out, requiring mother to develop a schedule each day reduces the likelihood children will be unattended. The fact the plan might be somewhat burdensome in requiring an early morning call does not make it unreasonable.

The court has wide latitude in fashioning an order to protect children's safety and interests. (*In re Briana V.* (2015) 236 Cal.App.4th 297, 311.) We do not reverse an order "'absent "a manifest showing of abuse"'" of discretion. (*In re Natalie A.* (2015) 243 Cal.App.4th 178, 187.) The court did not abuse its discretion in imposing these requirements.

DISPOSITION

The orders are affirmed.

THOMPSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.